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Attorneys for the United States UNITED STATES DISTRICT COURT DISTRICT OF NEVADA UNITED STATES OF AMERICA, Plaintiff, Joint Motion to Correct Sentence Under Sentence Under Sentence Under ELIPTON JAMES JACKSON, THE UNITED STATES, by Elizabeth O. White, Appellate Chief and Assistant United States Attorney, and Clifton James Jackson, through his counsel, Nisha Brooks-Whittington, Assistant Federal Public Defender, respectfully move this Court to vacate Jackson's sentence under 28 U.S.C. § 2255, and set a briefing schedule for re-sentencing, Lantroduction		(775)784-5438		
UNITED STATES DISTRICT COURT DISTRICT OF NEVADA UNITED STATES OF AMERICA, Plaintiff, UNITED STATES OF AMERICA, Sentence Under 28 U.S.C. § 2255 THE UNITED STATES, by Elizabeth O. White, Appellate Chief and Assistant United States Attorney, and Clifton James Jackson, through his counsel, Nisha Brooks-Whittington, Assistant Federal Public Defender, respectfully move this Court to vacate Jackson's sentence under 28 U.S.C. § 2255, and set a briefing schedule for re-sentencing, Introduction	5	9		
UNITED STATES DISTRICT COURT DISTRICT OF NEVADA UNITED STATES OF AMERICA, Plaintiff, V. Joint Motion to Correct Sentence Under 28 U.S.C. § 2255 CLIFTON JAMES JACKSON, Defendant. THE UNITED STATES, by Elizabeth O. White, Appellate Chief and Assistant United States Attorney, and Clifton James Jackson, through his counsel, Nisha Brooks-Whittington, Assistant Federal Public Defender, respectfully move this Court to vacate Jackson's sentence under 28 U.S.C. § 2255, and set a briefing schedule for re-sentencing, L. Introduction				
DISTRICT OF NEVADA UNITED STATES OF AMERICA, Plaintiff, Joint Motion to Correct Sentence Under Sentence Under 28 U.S.C. § 2255 CLIFTON JAMES JACKSON, Defendant. THE UNITED STATES, by Elizabeth O. White, Appellate Chief and Assistant United States Attorney, and Clifton James Jackson, through his counsel, Nisha Brooks-Whittington, Assistant Federal Public Defender, respectfully move this Court to vacate Jackson's sentence under 28 U.S.C. § 2255, and set a briefing schedule for re-sentencing, L. Introduction	6		D.M.	
UNITED STATES OF AMERICA, Plaintiff, Joint Motion to Correct Sentence Under Sentence Under 28 U.S.C. § 2255 THE UNITED STATES, by Elizabeth O. White, Appellate Chief and Assistant United States Attorney, and Clifton James Jackson, through his counsel, Nisha Brooks-Whittington, Assistant Federal Public Defender, respectfully move this Court to vacate Jackson's sentence under 28 U.S.C. § 2255, and set a briefing schedule for re-sentencing, L. Introduction	7	7		
UNITED STATES OF AMERICA, Plaintiff, Joint Motion to Correct Sentence Under Sentence Under 28 U.S.C. § 2255 CLIFTON JAMES JACKSON, Defendant. THE UNITED STATES, by Elizabeth O. White, Appellate Chief and Assistant United States Attorney, and Clifton James Jackson, through his counsel, Nisha Brooks-Whittington, Assistant Federal Public Defender, respectfully move this Court to vacate Jackson's sentence under 28 U.S.C. § 2255, and set a briefing schedule for re-sentencing, Introduction		DISTRICT OF NEVADA		
Plaintiff, 3:11-cr-142-RCJ-VPC V. Joint Motion to Correct Sentence Under 28 U.S.C. § 2255 CLIFTON JAMES JACKSON, 1 Defendant. 1 THE UNITED STATES, by Elizabeth O. White, Appellate Chief and Assistant United States Attorney, and Clifton James Jackson, through his counsel, Nisha Brooks-Whittington, Assistant Federal Public Defender, respectfully move this Court to vacate Jackson's sentence under 28 U.S.C. § 2255, and set a briefing schedule for re-sentencing,	8			
Plaintiff, Plaintiff, 3:11-cr-142-RCJ-VPC Joint Motion to Correct Sentence Under 28 U.S.C. § 2255 CLIFTON JAMES JACKSON, Defendant. THE UNITED STATES, by Elizabeth O. White, Appellate Chief and Assistant United States Attorney, and Clifton James Jackson, through his counsel, Nisha Brooks-Whittington, Assistant Federal Public Defender, respectfully move this Court to vacate Jackson's sentence under 28 U.S.C. § 2255, and set a briefing schedule for re-sentencing, L. Introduction	a			
v.) Joint Motion to Correct Sentence Under 28 U.S.C. § 2255 CLIFTON JAMES JACKSON,) THE UNITED STATES, by Elizabeth O. White, Appellate Chief and Assistant United States Attorney, and Clifton James Jackson, through his counsel, Nisha Brooks-Whittington, Assistant Federal Public Defender, respectfully move this Court to vacate Jackson's sentence under 28 U.S.C. § 2255, and set a briefing schedule for re-sentencing,	ر	<u> </u>	DC L VDC	
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v.) Joint Motion to Correct Sentence Under 28 U.S.C. § 2255 CLIFTON JAMES JACKSON,) Defendant.) THE UNITED STATES, by Elizabeth O. White, Appellate Chief and Assistant United States Attorney, and Clifton James Jackson, through his counsel, Nisha Brooks-Whittington, Assistant Federal Public Defender, respectfully move this Court to vacate Jackson's sentence under 28 U.S.C. § 2255, and set a briefing schedule for re-sentencing, L. Introduction)		
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CLIFTON JAMES JACKSON, Defendant. Defendant. THE UNITED STATES, by Elizabeth O. White, Appellate Chief and Assistant United States Attorney, and Clifton James Jackson, through his counsel, Nisha Brooks-Whittington, Assistant Federal Public Defender, respectfully move this Court to vacate Jackson's sentence under 28 U.S.C. § 2255, and set a briefing schedule for re-sentencing,) Sentence e		
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Defendant. THE UNITED STATES, by Elizabeth O. White, Appellate Chief and Assistant United States Attorney, and Clifton James Jackson, through his counsel, Nisha Brooks-Whittington, Assistant Federal Public Defender, respectfully move this Court to vacate Jackson's sentence under 28 U.S.C. § 2255, and set a briefing schedule for re-sentencing, Introduction	1 1	(
THE UNITED STATES, by Elizabeth O. White, Appellate Chief and Assistant United States Attorney, and Clifton James Jackson, through his counsel, Nisha Brooks-Whittington, Assistant Federal Public Defender, respectfully move this Court to vacate Jackson's sentence under 28 U.S.C. § 2255, and set a briefing schedule for re-sentencing, Introduction	14			
THE UNITED STATES, by Elizabeth O. White, Appellate Chief and Assistant United States Attorney, and Clifton James Jackson, through his counsel, Nisha Brooks-Whittington, Assistant Federal Public Defender, respectfully move this Court to vacate Jackson's sentence under 28 U.S.C. § 2255, and set a briefing schedule for re-sentencing, Introduction	15	<u> </u>		
THE UNITED STATES, by Elizabeth O. White, Appellate Chief and Assistant United States Attorney, and Clifton James Jackson, through his counsel, Nisha Brooks-Whittington, Assistant Federal Public Defender, respectfully move this Court to vacate Jackson's sentence under 28 U.S.C. § 2255, and set a briefing schedule for re-sentencing, Introduction				
Assistant United States Attorney, and Clifton James Jackson, through his counsel, Nisha Brooks-Whittington, Assistant Federal Public Defender, respectfully move this Court to vacate Jackson's sentence under 28 U.S.C. § 2255, and set a briefing schedule for re-sentencing, Introduction	16			
Assistant United States Attorney, and Clifton James Jackson, through his counsel, Nisha Brooks-Whittington, Assistant Federal Public Defender, respectfully move this Court to vacate Jackson's sentence under 28 U.S.C. § 2255, and set a briefing schedule for re-sentencing, Introduction	17	THE UNITED STATES, by Elizabeth O. White, Appellate Chief and		
Nisha Brooks-Whittington, Assistant Federal Public Defender, respectfully move this Court to vacate Jackson's sentence under 28 U.S.C. § 2255, and set a briefing schedule for re-sentencing, Introduction				
this Court to vacate Jackson's sentence under 28 U.S.C. § 2255, and set a briefing schedule for re-sentencing, L Introduction	18	Assistant United States Attorney, and Clifton James Jackson, through his counsel,		
this Court to vacate Jackson's sentence under 28 U.S.C. § 2255, and set a briefing schedule for re-sentencing, L Introduction	1 0	10 N: 1 D 1 WILLS A D 1 1D 11: D 6	1 (6.11	
this Court to vacate Jackson's sentence under 28 U.S.C. § 2255, and set a briefing schedule for re-sentencing, Introduction	19	Nisha Brooks-Whittington, Assistant Federal Public Defen-	der, respectfully move	
schedule for re-sentencing, Introduction	20	20 this Count to recent Jackson's contained and 20 H.C.C. S. S.	1955 and got a building	
schedule for re-sentencing, 22 Introduction			255, and set a briefing	
I Introduction	21			
I Introduction	22			
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	24	In February 2012, a jury convicted Jackson of possession of a firearm by a		
I. Introduction	19 20 21	Nisha Brooks-Whittington, Assistant Federal Public Defendable this Court to vacate Jackson's sentence under 28 U.S.C. § 2 schedule for re-sentencing,	der, respectfully move	
T T1 1 0010 1 1 1 T 1 0 1 0 0 1	24	24 In February 2012, a jury convicted Jackson of posses	sion of a firearm by a	

as an Armed Career Criminal under 18 U.S.C. § 924(e)(2)(B) ("the ACCA"), and

convicted felon. ECF No. 30. At sentencing, this Court found that Jackson qualified

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sentenced him to 180 months' imprisonment. ECF Nos. 61, 65. In doing so, the Court relied on, among other things, a prior offense (attempted robbery) that was a "violent felony" only by virtue of the ACCA's residual clause. See PSR ¶¶ 24, 41.

Jackson appealed, CR 63, and the court of appeals affirmed. CR 74. In 2014,

Jackson filed a § 2255 motion, CR 84, 85, which this Court denied. CR 86.

In June 2015, the Supreme Court issued its decision in *Johnson* v. *United States*, 135 S. Ct. 2251 (2015). *Johnson* held that the residual clause of the Armed Career Criminal Act's "violent felony" definition is void for vagueness. The Supreme Court subsequently held that the rule announced in *Johnson* provides retroactive relief to defendants who were sentenced as Armed Career Criminals based on offenses deemed "violent felonies" only by virtue of the residual clause. *See Welch* v. *United States*, 136 S. Ct. 1257 (2016).

II. Points and Authorities

In light of *Johnson* and *Welch*, the parties agree that Jackson does not qualify as an Armed Career Criminal, and that he is entitled to re-sentencing without application of the ACCA.¹ The parties therefore jointly sought, and obtained, authorization from the Ninth Circuit to file a second 2255 Motion.² *See* CR 103. The parties further agree that resentencing will be governed by *current*

The parties agree that Jackson's prior conviction for attempted robbery under Nevada law is no longer a "violent felony" for purposes of the ACCA after *Johnson*. However, the parties disagree as to whether that conviction and Jackson's prior conviction for battery with a deadly weapon under Nevada law continue to qualify as "crimes of violence" for purposes of U.S.S.G. § 2K2.1 after *Johnson*.

Before a federal prisoner may file a successive motion in the district court under § 2255, a court of appeals must certify that the motion satisfies one of the "gatekeeping" conditions in 28 U.S.C. § 2255(h).

law, including the fact that *Johnson* effectively renders invalid the residual clause of U.S.S.G. § 4B1.2.³

Notwithstanding these areas of agreement, the parties disagree about the correct calculation of Jackson's offense level and advisory guidelines range under current law. Specifically, the government contends that without the ACCA, Jackson's base offense level is 26 and his criminal history category is III, which results in a guidelines range of 78-97 months. However, Jackson argues that after Johnson, neither his prior conviction for attempted robbery nor his prior conviction for battery with a deadly weapon under Nevada law qualifies as a predicate crime of violence for purposes of § 2K2.1, and therefore his total offense level is 16. According to Jackson, with a total offense level of 16 and criminal history category of III, his resulting guideline range is 27-33 months. With these arguments in mind, the parties respectfully request the opportunity to brief their respective positions for the Court prior to a resentencing hearing. Chiefly, whether Jackson's prior convictions for attempted robbery and for battery with a deadly weapon are crimes of violence under U.S.S.G. § 2K2.1 after Johnson, and what sentence the Court should impose.

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³ The government does not believe that *Johnson* provides an independent basis for collateral relief relating to the sentencing guidelines. Where a defendant is entitled to § 2255 relief in the form of resentencing on some other ground, however, the district court at resentencing should sentence using the guidelines that are in effect at the time of resentencing. *Cf. Ferrara* v. *United States*, 384 F. Supp. 2d 384, 435 (D. Mass. 2005), *aff'd*, 456 F.3d 278 (1st Cir. 2006).

V. Conclusion 1 For the foregoing reasons, the parties respectfully request that the court 2 grant this joint motion, vacate Defendant's sentence, and set a briefing scheduled 3 regarding re-sentencing. 4 Dated this 23rd day of June, 2016. 5 6 Respectfully submitted, 7 8 RENE L. VALLADARES DANIEL G. BOGDEN Federal Public Defender **United States Attorney** 9 s/ Nisha Brooks-Whittington s/ Elizabeth O. White By: By: 10 11 NISHA BROOKS-WHITTINGTON ELIZABETH O. WHITE Assistant Federal Public Defender Appellate Chief and 12 District of Nevada Assistant U.S. Attorney 411 E. Bonneville Ave Suite 250 District of Nevada 13 Las Vegas, NV 89101 100 West Liberty, Suite 600 14 Phone: 702-388-6577 Reno, Nevada 89523 Fax: 702-388-6261 Phone: 775/784-5438 15 Fax: 775-784-5181 Attorney for Clifton James Jackson 16 17 18 IT IS SO ORDERED this 20th day of July, 2016. 19 20 DISTRICT JUDGE UNITED STATES 21 22 23 24 25

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